

## CHAPTER SEVEN

### The Lease You Can Do

#### *Residential Leases*

A LEASE HAS ALL THE ELEMENTS OF A CONTRACT explained earlier. The difference is that, rather than buying something, a lease is a contract to *rent* it for a specified period of time, for a specified price. There are two main kinds of leases. The first involves real estate, such as a lease for an apartment, which is discussed in this chapter. The second includes all other kinds of property, such as leases for vehicles, which are discussed in [chapter 9](#). Someone who leases property to someone else (an owner) is a **landlord** or a **lessor**. The person who takes out the lease is called a **tenant** or **lessee**.

The advantage of leasing is that it doesn't usually require you to invest as much of your money as buying, because you are not paying for ownership of the property. A lease cushions you from the risk of owning property that may **depreciate**, or decrease in value -- but there is the chance that it might **appreciate**, increase in value, a gain that won't belong to you. You must return the property to the owner at the end of the lease period, and your payments never add up to **equity** (an ownership interest) in the property, unless you have an option to purchase with a rent credit toward the purchase price.

Most states have laws that protect tenants--people who lease their homes. But these laws vary substantially from place to place. Big cities, which have the most tenants and many social problems related to housing, are usually the most protective of tenants' rights. Still, there are certain fundamental points that can be of aid no matter where you live.

## CHOOSING A LANDLORD

Just as with any contractual relationship, the first decision in a rental relationship is when the landlord and tenant choose each other. The landlord-tenant relationship can last for years or decades, and indeed many have outlasted the marriages in the rented property. But short of an unhappy marriage, there's little that can make life more miserable than an unhappy landlord-tenant relationship.

So, when you go to check out a prospective rental property, don't just evaluate the space and amenities (number of rooms, baths, etc.). Evaluate the landlord. It is ideal if you can talk to the tenant you're going to be replacing. If the apartment or house is vacant when you look at it, ask the landlord to give you the previous tenant's name. Make a note of the landlord's cooperation in this regard. In an apartment building, speak to other tenants you see in the lobby or on the elevator. You might even want to knock on doors. What do you want to find out?

**! Putting in the fix.** A tenant is entitled to have everything in the apartment in good working order. Thus this is the single most important question to get answered. One way to answer it is to see the condition of the property. Is much broken? If it is, take a look and see if you can discern how long it's been that way. An above-average landlord will, when alerted of flaws that you find, be willing to sign a written list of problems, including a promise to fix them. An average landlord will make an oral promise. And the one who won't even promise is certain not to do it. Stay away.

Remember that repairs are not the same as improvements. You can negotiate for a post-1966 refrigerator, but you're not entitled to one.

**! Check the record.** You can see if there's a record about the landlord and this property with the local building management association, apartment association, or Board of Realtors, the local

office of the Institute of Real Estate Management, and whatever agency handles tenant complaints in your locality. The best preparation would be to look at the public records available in the courthouse (has the municipality sued the landlord for code violations?) and the local code inspection agency (look for a pattern of *serious* violations).

**!** **Divinity in the details.** Obviously repairs made outside of your own property, such as in the lobby of an apartment building, bear on the above as well. But there are also little hints that tell you how much the landlord cares. One quick way to judge the quality of a building is to look at the doorbells at the front entrance. Are the tenants' names approximately uniform, such as generated by a plastic label gun or, even better, on miniature engraved plastic tabs? If so, they were put there by an above-average landlord who cares about the appearance of the building. If, on the other hand, the names were written on slivers of index cards, shirt cardboards, and looseleaf paper -- or they're missing altogether -- this landlord doesn't care.

Similarly, how are the names written on the mailboxes? What is the condition of the mailboxes and the surrounding area? The elevator? How clean is the glass in the lobby? These little items don't necessarily bear on your own life in your cubbyhole, but they can bear on your overall feeling about where you live, which is not to be underestimated in your overall feeling about life. Just as importantly, they tell you about your prospective living partner. When it comes to building maintenance, it's not even a close choice -- take Felix over Oscar.

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Sidebar

## OWNER OF A BROKER'S HEART

If you use a broker or Realtor (see [chapter 11](#)) to find an apartment, he or she isn't going to be your best source of information about this match. The broker's commission -- which, in rentals, is *almost always paid by the tenant*, and is usually equivalent to a month's rent -- is riding on making you a match somewhere. If you need the broker to find exclusive listings or unlisted properties, this service may be worth every penny. And if the broker or Realtor's well established, you should take any recommendation seriously. But you've got to do the footwork of checking out the landlord yourself.

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## THE LEASE APPLICATION

A landlord is also entitled to learn a little about you. The main tool for doing so is the lease application.

The application is usually on a standard form available at stationery stores, though larger organizations may use their own form. One thing the form does is authorize the landlord to confirm the information you give and to run a credit check. Landlords are most concerned about your ability to pay the rent, so they will ask for three to five years' worth of rental and employment history, and will likely call your former landlords and employers. What landlords want to see here, above all, is stability. Keep in mind that a landlord who runs a check like this on you also ran it on your prospective neighbors. You want stability there, as well.

Landlords may also use credit bureaus and special agencies that specialize in tenant records,

specifically evictions and rent-defaults.

### **The Suitable Tenant**

Remember through this process that a landlord has every right to be concerned about your suitability as a tenant. A suitability includes straightforward matters like tenancy history, income, credit history and whether you have a criminal record. It may include purple hair and nose rings, too. This kind of discrimination is permissible.

On the other hand, there is *impermissible* discrimination, such as that based on race, religion, ethnic origin, sex, handicap, or family status. Impermissible discrimination is prohibited in most situations by the federal Fair Housing Act. (There are some exceptions for small, owner-occupied buildings, where a tenant is almost a member of the family.) The Act also forbids landlords from refusing to rent to families with children (except in certain types of retirement communities), or from evicting or harassing a tenant for any of these reasons (or for threatening action over discrimination). In addition, the post-Civil War Civil Rights Act of 1866 prohibits discrimination based on the race, ethnic origin, or color of a tenant or prospective tenant, without exception.

Some states and cities have extended these protection to other classes, making it illegal to discriminate on the basis of sexual orientation, old age, or source of income (e.g., welfare, social security, alimony, or child support).

If you think you have been a victim of illegal discrimination in applying for a rental, you can file an administrative complaint with a local, state, or federal agency -- the U.S. Department of Housing and Urban Development (HUD) -- or you can sue the landlord in court. Because of the high burden of

proof faced by a claimant in this kind of case, you would be well advised to seek the aid of a lawyer if you choose to sue. Ultimately, if you prove your claim, the agency or the court may require the landlord to rent you the premises and perhaps pay damages, including attorney's fees.

## THE LEASE

All leases are contracts by which the landlord grants the tenant *exclusive* use of the premises in exchange for rent for a certain period of time. Leases fall into two broad categories:

!      **Tenancy for years.** This is a lease for a *fixed* period of time, called a **term**. No notice is required to terminate a tenancy for years, because the term defines when it ends. These leases are usually written, and must be written if they are to extend beyond one year. These give both parties maximum security and predictability, with rent and even rent increases spelled out. Of course, they reduce tenants' flexibility - - they can't just move out in the middle of the term.

!      **Periodic tenancy.** This is also called a **month-to-month** tenancy. These leases are often for an indefinite period of time, and require some notice to terminate. The notice period is usually the equivalent of one rent period, usually a month. Periodic tenancies may be oral. A periodic tenancy gives both landlord and tenant maximum flexibility and minimum security.

These two types of leases often meet at the end of a tenancy for years, when no renewal is signed and the **leasehold** (the status of the tenancy) switches to month-to-month. This is commonly called a **holdover** tenancy. In many leases, should the tenant holdover after the expiration of the lease, the rent is doubled. If the lease does not address holdovers, in some jurisdictions, at the option of the landlord, a tenant's holding over may simply operate as a renewal of the lease, usually for a one year

term. Because giving the proper form of notice is highly technical in some places, landlords often scramble to avoid holdovers.

### **The Lease Form**

Most tenants and landlords prefer to deal with written leases. Tenants know their rent cannot be raised except as provided by the lease, and of course it's nice to know you'll have a place to live for the term. Landlords know they will receive rent throughout the term, and need not risk an extended vacancy or the time and expense of listing and showing the property. Landlords also like the fact that the lease will set out or refer to the rules and regulations for the premises, and will bind tenants to obey them. In addition, written leases usually provide for a late fee if rent is not paid on time (legally required to be reasonable in amount).

In a written lease, the landlord may give up the right to increase rent. In most urban areas, this could be a substantial concession. There are drawbacks to a written lease from the tenant's perspective too. Leases are almost always provided by the landlord, and are drafted with the landlord in mind. So the landlord can get you to sign away rights you would otherwise have. However, often local law cancels out waivers of certain tenants' rights (as discussed below). Also, because in most areas where rental properties are scarce, your bargaining power is uneven, courts are inclined to deem these as contracts of adhesion, and to construe ambiguous terms against the drafter -- the landlord.

But you've already learned that the fact that you are presented with a pre-printed form does not mean you cannot negotiate as to terms. (Indeed, many landlords will give you a pre-printed lease with scratch-outs of their own.) If you have any leverage to negotiate, negotiate. Remember to get both sides

to initial all the changes -- that's proof that the changes weren't written in later.

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Sidebar

### **Regulation of Leases**

As mentioned above, many states and municipalities place limitations on what landlords can put in their written leases. For example, state courts have struck down lease clauses that provide that the tenant accept an apartment *As is* and that the tenant must pay full rent regardless of the condition of the property. Most states also frown on **confessions of judgment**, which were legal blank checks for the landlord. They allowed the landlord to walk into court *and as the tenant's agent* and on the tenant's behalf confess judgment -- admit to whatever the landlord says and agree to a legal judgment for whatever amount the landlord says the tenant owes.

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Sidebar

### **NEW THINKING**

For hundreds of years common-law courts regarded leaseholds as a type of interest in real estate called an **estate for years**. Under this approach, the renter or lessee's rights against the landlord were comparable to a home buyer's rights against a seller -- very few. (The best-known, but least



understood, tenant's right was the A covenant of quiet enjoyment,@ which had nothing to do with noise or fun but guaranteed that no one would interfere with the renter's right to remain in the property during the term.)

In modern times, however, the courts (and to a large extent legislatures) have come to view real-estate leases as more like a *contract for shelter and services* than the transfer of a land interest. The fundamental difference is that every such contract includes an implied (unstated) **warranty of habitability**, a promise that the premises are fit to live in. The warranty of habitability imposes a continuing obligation on the landlord to keep the property in decent condition: at a minimum standard of safety and sanitation, defined by local codes. The landlord's failure to comply A substantially@ with this warranty can entitle the tenant to withhold or reduce the rent owed to the landlord, or even to declare the lease terminated and move out. (In some jurisdictions, there are laws permitting the tenant to pay rent held by the court in the event of a dispute with the landlord.) In return, the tenant is obligated not to A trash the place,@ and generally to follow the landlord's reasonable rules and regulations.

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Sidebar

### MONEY FOR NOTHING

The shift away from the A real estate@ approach has also resulted in an important change in a landlord's

obligations to replace a tenant who leaves in the middle of the term. Under the old approach, the landlord was entitled to keep the apartment empty during the tenant's leasehold, and the tenant had to keep paying rent. Now traditional contract principles apply, including the principle of **mitigation of damages**. As applied here, this principle requires that, even if the tenant wrongfully violates the lease, the landlord has to make a good faith effort to **re-let** the property -- find a new tenant at the market rate. The old tenant only has to pay rent for the time the premises were vacant and, after the property is re-let, the shortfall if the new rent is less than the old.

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The most pervasive form of rental regulation is **rent control**, which limits the amount of rent or rent increase landlords can charge. It exists in certain municipalities in New York, New Jersey, Massachusetts, California, and the District of Columbia. On the other hand, many states have specifically forbidden municipalities from enacting rent control. Rent control is a very controversial policy. Supporters claim that it keeps housing affordable and prevents the working and middle class from being priced out of urban areas where they work. Opponents say it is an unwarranted interference with the market that kills the incentive to build and maintain rental housing. Because rent control is so local, and its types vary so widely, it is beyond the scope of this book to say much more about it.

### **Security Deposits**

One of the unpleasant aspects of renting property is the payment of a **security deposit**. The security

deposit is money to protect the landlord in case the tenant damages the property or fails to pay rent. Usually the tenant pays this amount at the time the lease is signed. The landlord may ask for any amount -- this is also subject to negotiation -- but, again, many local laws restrict the amount to the equivalent of one or two months' rent. This money, then, is refundable as long as the tenant complies with the lease. But you may not normally apply it to rent, even the last month's rent before you move, since that undermines the landlord's security blanket.

Because security-deposit abuse by landlords is a problem, many states and localities require that the deposit be kept in a separate account for security deposits, with interest payable to the tenant. (You can negotiate for interest on your security deposit if the law does not require it where you are renting. It's a reasonable request, since the idea is to give the landlord security, not an interest-free loan.) Some states also require that the bank and account where the security deposit is held be designated on the lease or by letter within 30 days of the lease. And states and localities often require that the security deposit be returned within a certain number of days after the tenant moves out, and require that the landlord specify what repairs were necessary and what they cost before money can be withheld from the deposit. Often violation of these requirements during the tenancy is punished by loss of the security, and the tenant is permitted to apply the amount of the deposit to the next month's rent. Also, because of the abuse problem, a tenant who succeeds in convincing a judge that the security deposit was withheld may often receive extra damages.

## **LANDLORD-TENANT CONFLICTS**

### **Self-Help**

Those who watch old reruns of "The Honeymooners" from the 50s and 60s will remember Ralph Kramden being Aput out on the street@ by his landlord -- literally out on Chauncey Street with all his and Alice=s worldly belongings. There was a time when Aself help@ was an approved remedy in landlord-tenant relations. If you didn=t pay the rent, the landlord simply Achanged the locks@ and kicked you out. That=s illegal now, as is turning off utilities, much less -- as happened on another old TV show -- removing the tenant=s door from the apartment for non-payment of rent. Now *only a court can order an eviction* -- and only the sheriff can carry one out. We will briefly discuss the eviction process in the next section.

On the other hand, a number of self-help remedies may be available to *tenants* when landlords don=t keep their end of the bargain, mainly by failing to do proper maintenance. These rights will vary according to state and local law. Even before you read these, keep in mind that a judge is likely to have the last word as to whether you have acted correctly in taking matters into your own hands:

- !     **Repair and deduct.** This law sometimes permits the tenant to make *essential* repairs that the landlord refuses to make in reasonable time, and then to deduct the cost from the rent.
- !     **Reduced rent.** When the premises do not comply with the standards of the local building code, the law may permit tenants to serve notice on the landlord that they intend to pay reduced rent unless specified repairs are made by a reasonable time. If the repairs aren=t done, tenants can pay the landlord a rent amount that is less than the contract rent.
- !     **Unilateral termination.** AUnilateral@ means Aone-sided@ -- here, the side being you.

There are three possible bases that could justify unilateral termination:

- # **Illegal lease.** If the landlord has been cited for gross code violations, it may be illegal for you to even live there. If occupancy is illegal, so is the lease.
- # **Constructive eviction.** The landlord never sent you an eviction notice or brought an eviction action in court, but has made life in the premises so miserable that you can't really live there. **Constructive** means it's **As if** the landlord went ahead and evicted you.
- # **Material noncompliance.** This is reduced rent taken a step further. You give the landlord notice that, if things aren't fixed within a reasonable time, you're leaving.

If you do any of the above, if permitted by the law in your state -- or if you complain to the code-enforcing agency or join a tenants' organization -- the landlord may not have a right to evict you. In fact, if the landlord does so for any reason other than a breach of the lease (which, if you are acting justifiably and legally, you have not committed), the landlord may be guilty under state law for **retaliatory eviction** in some states. In these jurisdictions, retaliatory eviction is assumed whenever a landlord evicts you (or even threatens to), refuses to renew your lease, increases the rent, or decreases building services, within a legally-fixed period (usually some number of months) after you exercise any of your legal rights as a tenant.

If the landlord thinks you've acted improperly, the landlord generally has no self-help remedies. To get you out of the property, written notice has to be served that the lease will be terminated unless

you pay any back rent claimed to be due (or cease violating a building rule). To evict you, the landlord must take you to landlord-tenant court or housing court.

## **Housing Court**

Whether it's called the "landlord-tenant court," "housing court," or something else, there is a special court set up in most states for the **summary disposition** (quick resolution) of disputes between landlords and tenants. This usually precludes the right to a jury trial.

A landlord files the lawsuit in court and then **serves** -- delivers in a legally-specified way (sometimes mail in this case) -- a copy of the **summons** (notice that you must come to court) and **complaint** (description of the claims against you). In this summary procedure, you may have a court date within two weeks or so. If you show up, this is the kind of courtroom where it is easy to make your case -- judges are usually helpful and do not expect all tenants to be able to afford lawyers. The proceedings also tend to be rather informal, as court proceedings go.

If you choose to defend yourself, you can assert most of the contract defenses we discussed early on, as well as the special protections for tenants discussed in this chapter. Keep in mind that most states have very specific requirements for lease-termination letters. Find out what yours are; if the letter you received doesn't conform -- or if you didn't get one -- the landlord's case is automatically tossed out. The landlord has to start again. Some states require registration of all rental property. Find out if your landlord has complied; if not, the landlord may be out of luck.

If, alternatively, you don't show up, the court gives the landlord a **default judgment**, and sets a deadline, sometimes a few weeks, sometimes a few days, for you to move out. If you don't move out,

though, the landlord can arrange to have the sheriff or other local official physically remove you. The law will bend over backwards to give tenants the benefit of the doubt, but sooner or later, a contract *is* a contract.

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Sidebar

**THE LONG AND WINDING ROAD**

Considering all the technical requirements of suing in landlord-tenant court, properly serving the papers on the tenant, the processing and backlog in many courts and sheriff's offices, and housing-court judges' disinclination to order people out of their home, eviction is usually a slow process -- often many months long. And in many courts, the judge will call off the dogs if the tenant pays the amount of rent owed, even at the last minute -- at least this time. There's a point, though, where a landlord will convince the court not to let a habitual non-payer make the landlord go through hoops each month just to get the rent that is due. (Some leases even make a habitual non- or late-payment a separate kind of breach.) And then you really will be out on the street.

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